SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 571

EDITH BLOEDORN, EXECUTRIX OF THE ESTATE OF ROSE L. SUTHERLAND, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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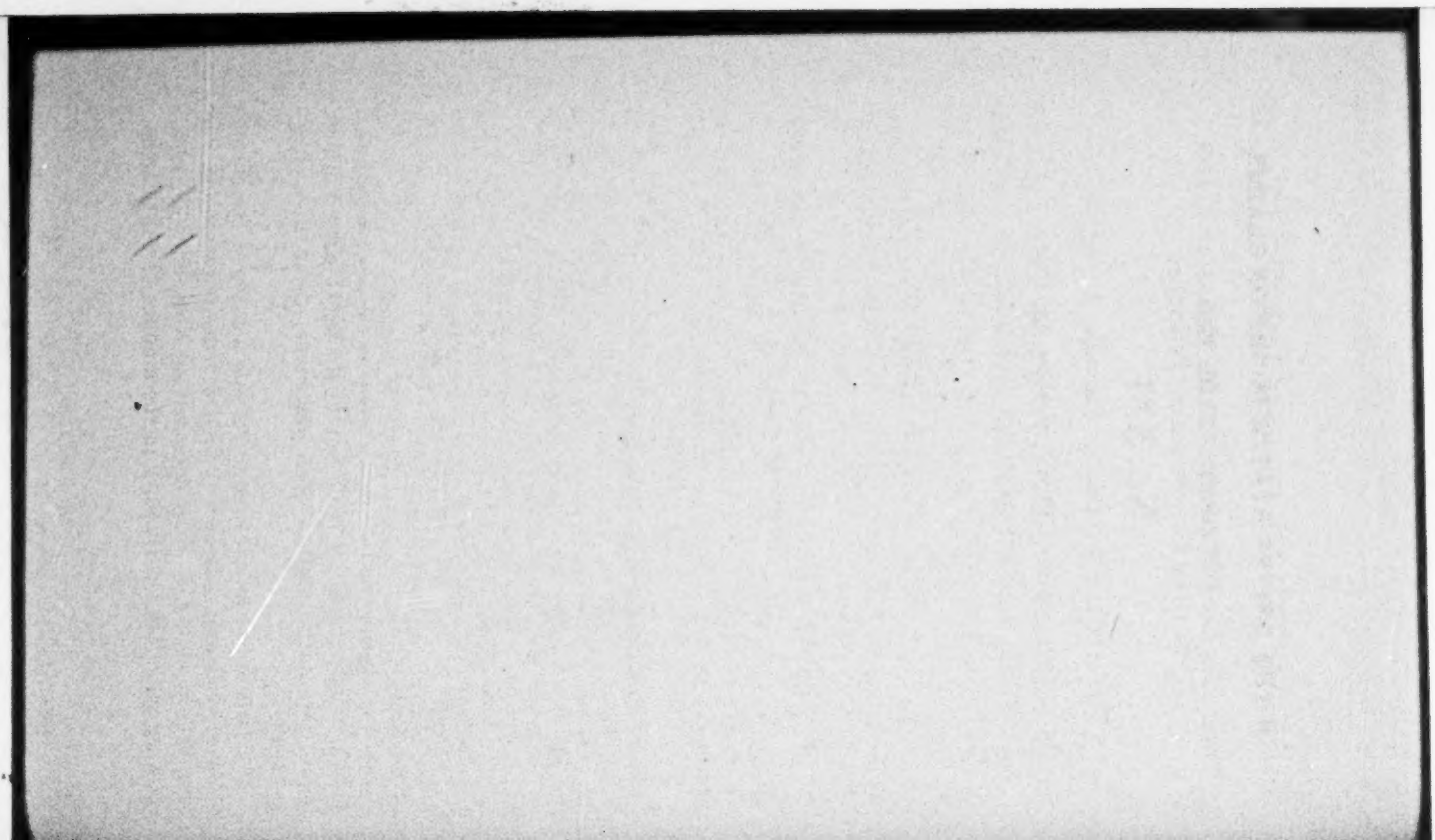

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

EDITH BLOEDORN, Executrix of the Estate of ROSE L. SUTHERLAND, Deceased, Petitioner,

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION—Filed September 11, 1951

Petitioner herein, Edith Bloedorn, executrix of the estate of Rose L. Sutherland, deceased, respectfully represents as follows:

(1) This is an action under Chapter 3 of the Internal Revenue Code, 26 United States Code. The jurisdiction of this Court is based upon Section 1491 of Title 28 of the United States Code.

(2) Petitioner, an individual living in Washington, D. C., is executrix of the estate of Rose L. Sutherland, who died on April 4, 1946. Letters testamentary were granted to petitioner on April 26, 1946 and continue in full force and effect.

(3) As executrix of the estate of the said Rose L. Sutherland (hereinafter called decedent) petitioner filed the fed-
[fol. 2] eral estate tax return for decedent's estate on July 7, 1947, disclosing a tax liability of $167,581.21 which was paid at that time.

(4) This estate tax liability was computed on the basis of a gross estate of $1,041,946.22, deductions of $37,392.30, and a deduction for property previously taxed in the amount of $373,891.95.

(5) The latter deduction related to assets which the decedent had inherited from her husband, George Sutherland (hereinafter called prior decedent), who died July 18, 1942.

(6) Decedent was executrix and sole legatee of the estate of prior decedent. Decedent filed a federal estate tax return for the estate of prior decedent on November 28, 1942, showing an estate tax liability in the amount of $124,213.88.

In making payment of this amount, decedent used $121,-840.31 of her own funds.

(7) During the course of investigation by the Bureau of Internal Revenue of decedent's estate tax return, the examining officer made certain adjustments which resulted in the determination of a gross estate of $1,038,582.78, deductions of $35,800.10, and a deduction for property previously taxed in the amount of $370,678.13. These adjustments resulted in an overassessment of $2,095.62. As executrix of decedent's estate, petitioner executed the appropriate Form 1244, Acceptance of Proposed Overassessment, agreeing to the said overassessment, reserving, however, the right to file a refund claim for overpayment of estate taxes arising out of the determination of the correct amount of the deduction for property previously taxed.

[fol. 3] (8) Included in decedent's gross estate were assets identified as having been acquired by decedent from the prior decedent, or as assets acquired in exchange for assets acquired from prior decedent, which were included in the latter's estate tax return at an aggregate value of $492,518.-44. In its determination of the deduction for property previously taxed, the defendant deducted from that amount, the sum of $121,840.31 which decedent had furnished from her own funds in payment of the federal estate taxes on prior decedent's estate.

(9) Section 812 (c) of the Internal Revenue Code provides that the deduction for property previously taxed shall be an amount equal to the value of any property which was included in the estate of a person who died within five years of her death, to the extent of the value used in determining the gross estate of the prior decedent, where an estate tax "was finally determined and paid by or on behalf of . . . the estate of such prior decedent".

(10) Based upon this section, petitioner claims that the correct deduction for property previously taxed is $492,-518.44, and that federal estate tax previously paid on decedent's estate was excessive to the extent of $36,212.44, of which $2,095.62 has been certified for refund to petitioner for other adjustments made as indicated above. Accordingly, on January 19, 1949, petitioner filed a timely claim for refund of $34,116.82 as the amount of estate tax erroneously

and illegally collected by the defendant, as a result of its erroneous computation of the deduction for property previously taxed, by deducting (a) the amount of estate taxes on the prior decedent's estate which decedent paid with her own funds (i. e. $121,840.31), from (b) the aggregate value [fol. 4] of assets identified in the estate of the decedent as having been acquired by inheritance from the prior decedent.

(11) Petitioner's claim for refund was formally disallowed, by registered mail, pursuant to Section 3772(a)(2) of the Internal Revenue Code, under date of February 9, 1950. Under the other terms of that section, the time within which the petitioner can file this suit does not expire until February 9, 1952.

(12) No part of the amount herein claimed to be due and owing petitioner by defendant has ever been paid; there has been no transfer or assignment of this claim or any part thereof, and petitioner is justly entitled to recovery of the amounts claimed after allowance of all just credits and offsets.

Wherefore, Petitioner prays judgment in her favor against the defendant on the facts hereinabove set forth, and the law applicable thereto, in the amount of $34,116.82, or such greater amount as may legally be due, plus interest from July 7, 1947, and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted, Edgar J. Goodrich; 607 Ring Building, Washington 6, D. C. Attorney for Petitioner.

Of Counsel: Guggenheimer, Untermyer, Goodrich & Amram, Lipman Redman; 607 Ring Building, Washington 6, D. C.

[fol. 5] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed January 11, 1952

The United States of America, by and through its attorney Ellis N. Slack, Acting Assistant Attorney General, for answer to the petition herein admits, denies, and otherwise makes answer thereto as follows:

1. Admits the allegations of paragraph 1.
2. Admits the allegations of paragraph 2.
3. Admits the allegations of paragraph 3.
4. Admits the allegations of paragraph 4.
5. Admits the allegations of paragraph 5,
6. Admits the allegations of paragraph 6.
7. Admits the allegations of paragraph 7, and alleges that the amount of $2,095.62, with interest of $314.34, was refunded to the petitioner herein on December 13, 1949.
8. Admits that included in the decedent's gross estate were assets identified as having been acquired by the decedent from the prior decedent, or as assets acquired in [fol. 6] exchange for assets acquired from prior decedent, which were included in the latter's estate tax return at an aggregate value of at least $492,518.44, and alleges that the Commissioner of Internal Revenue in his final determination of the estate tax liability of the decedent herein reduced the deduction for property previously taxed by $121,679.97 instead of $121,840.31, as alleged.
9. Admits the allegations of paragraph 9.
10. Admits that petitioner filed a claim for refund on January 9, 1949, in the amount of $34,116.82 on the grounds set forth in paragraph 10, but denies that petitioner is entitled to recover on any of the grounds set forth therein.
11. Admits the allegations of paragraph 11.
12. Admits that except for the amount refunded, as set forth in its answer to paragraph 7, no other refund of estate tax has been made to the petitioner.

Wherefore, defendant alleges that the petitioner is not entitled to any recovery in this suit and that the same be dismissed.

Ellis N. Slack, Acting Assistant Attorney General.
Elizabeth B. Davis, Attorney.

[fol. 7-8] PETITIONER'S MOTION FOR SUMMARY JUDGMENT—Filed May 12, 1953

Comes now Petitioner by her counsel, and respectfully moves the Court for Summary Judgment against Defendant in the amount of $34,116.82 (or such greater amount as may legally be due) plus interest thereon from July 7, 1949, as prayed for in her Petition, and as grounds for this Motion respectfully shows:

1. The pleadings on file show that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law.

Wherefore, Petitioner respectfully prays that this Motion be granted and that the Court enter its Order accordingly.

Respectfully submitted, Edgar J. Goodrich, Esq., 607 Ring Building, Washington 6, D. C., Attorney for Petitioner.

Of Counsel: Guggenheimer, Untermyer, Goodrich & Amram, Lipman Redman, Esq., 607 Ring Building, Washington 6, D. C.; George S. Elmore, Esq., 1317 F Street, N. W., Washington, D. C.

[fol. 9] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

RESPONSE OF THE UNITED STATES TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT—Filed July 9, 1953

Comes now the United States, by H. Brian Holland, its Assistant Attorney General, and moves the Court to overrule the plaintiff's motion for summary judgment and to enter summary judgment against the plaintiff and in favor of the United States in the above entitled action because the pleadings show that there is no triable issue as to any material fact and that the United States is entitled to judgment as a matter of law.

Respectfully submitted, H. Brian Holland, Assistant Attorney General.

[fol. 10] ARGUMENT AND SUBMISSION OF CASE

On October 6, 1953, the case was argued and submitted on plaintiff's and defendant's motions for summary judgment by Mr. Edgar J. Goodrich for the plaintiff and by Mrs. Elizabeth B. Davis for the defendant.

[fol. 11] IN THE UNITED STATES COURT OF CLAIMS

No. 50317

EDITH BLOEDORN, Executrix of the Estate of Rose L. Sutherland, Deceased,

v.

THE UNITED STATES

Mr. Edgar J. Goodrich for the plaintiff; Messrs. Guggenheimer, Untermyer, Goodrich & Amram, Mr. Lipman Redman, and Mr. George S. Elmore were on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Assistant Attorney General H. Brian Holland, for the defendant; Mr. Andrew D. Sharpe and Mr. Ellis N. Slack were on the briefs.

OPINION ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT—November 3, 1953

MADDEN, Judge, delivered the opinion of the court:

The plaintiff sues for the recovery of estate taxes which she paid, and says she should not have been required to pay, upon the estate of her mother, Rose L. Sutherland. Rose L. Sutherland's husband died in 1942, leaving her as his sole legatee and executrix. His estate amounted to $492,518.44. A federal estate tax of $121,679.97 was imposed upon his estate. Rose L. Sutherland paid that tax out of her own funds. She died in 1946, still owning all the property which she had inherited from her husband, as well as other property. Her entire estate amounted to $1,038,582.78. The plaintiff is the executrix of that estate.

Section 812 (c) of the Internal Revenue Code provides that in applying the estate tax there shall be deducted, *inter*

alia, from the value of the gross estate, "property previ-
[fol. 12] ously taxed." Property previously taxed is property which the decedent has received by inheritance from a prior decedent who has died within five years, and which was subjected to an estate tax as a part of the estate of the prior decedent.

The plaintiff claimed that $492,518.44 of the estate of Rose L. Sutherland was "property previously taxed" and therefore deductible from her gross estate. The Bureau of Internal Revenue claimed that only $370,678.13, that is, the amount of the gross estate of Rose L. Sutherland's husband less the tax paid upon it, was "property previously taxed." The plaintiff paid the tax as asserted by the Bureau, and filed a claim for refund which was rejected. She sues for the amount by which the tax was increased by the disallowance of the full deduction.

The plaintiff says that the instant situation complies exactly with the statute authorizing the deduction. All of the $492,518.44 formed a part of the gross estate of Rose L. Sutherland's husband who died within five years before the death of Rose L. Sutherland. It was all subjected to an estate tax, as a part of that estate. That tax was paid. The Government says that, in spite of this apparent compliance with the requirements of the statute, the full deduction is not permissible; that Congress intended no such result.

We think that the only thing that could have engaged the attention of Congress in enacting the legislation here in question was the net amount which the second decedent had received from the first decedent, which net amount, or its proceeds, remained in the estate of the second decedent when he died within five years after the death of the first decedent. The question whether the second decedent paid the tax out of his own funds, or out of the proceeds of insurance not includible in the estate of the first decedent, or out of the assets of the estate, would depend, apart from its effect upon the tax question, upon collateral circumstances. If the heir of the first decedent happened to have, or to acquire out of the proceeds of insurance, enough money to pay the estate tax, he could, without one penny's effect upon his net worth, pay it. If it seemed important not to sell the investments which the first decedent had, the heir would pay the tax out of his own liquid funds if he had such funds. If

not, he would, if he could, borrow money on his own credit, [fol. 13] or the prospects of his inheritance, and hope to pay it back out of his income or that of the inherited investments. See *Commissioner* v. *Garland*, 136 F. 2d 82. Whether he should do one or the other of these things would be determined on the basis of prudent management of his property.

If, however, the large saving in taxes for which the plaintiff contends could be achieved by leaving the estate property intact, the heir, if of advanced age or unpromising health, would make every effort to keep the estate intact even if doing so would be of no use other than to save taxes.

We do not think that Congress had any intention of discriminating in favor of a well-financed heir, merely because he was so well-financed that he could not only pay out of his own funds the tax on the estate of the first decedent, but would not find it necessary, over a five-year period, to reimburse himself for the money so paid. If it did so intend, it must have been willing to permit a substantial loss of revenue, in cases such as the instant one, without any possible reason based upon either fairness, convenience of administration, or expediency, to justify the loss. We think it would be unfair to the legislature to attribute to it an intention which could only be described as erratic.

The plaintiff points to the reference in Section 812 (c) to taxes "paid by or on behalf of such donor, or the estate of such prior decedent * * *." We think that this language is nothing more than a recognition by Congress that estate taxes may be paid by heirs out of their own funds rather than out of the assets of the estate, and an assurance that no prejudicial consequence, with regard to the application of the statute, shall result from their being so paid.

There is here no problem of double taxation except in a merely formal and unsubstantial sense. As much of net worth as accrued to Rose L. Sutherland and her estate from the estate of her husband, after deducting the taxes paid by her from her own funds in order to get title to the estate of her husband, has been allowed as a deduction from her gross estate, in computing its taxes. The allowance of the greater deduction claimed would be an attribution to Congress of an intention to discriminate irrationally between taxpayers. It would be an inexcusable sticking in the letter of a statu-

tory text. In *Central Hanover Bank and Trust Co.* v. *Com-*
[fol. 14] *mission,* 159 F. 2d 167, cert. den. 331 U. S. 836, Judge Learned Hand, in his opinion denying the same contention made herein by the plaintiff, for a literal interpretation of Section 812 (c), said:

> There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen was not foreseen.

The decision just cited affirmed the decision of the Tax Court, which appears under the title of *Estate of Wilkinson* v. *Commissioner,* 5 T. C. 1246. The Court of Appeals for the Fifth Circuit decided the question the same way in *Bahr* v. *Commissioner,* 119 F. 2d 371. In the later case of *Thomas* v. *Earnest,* 161 F. 2d 845, that Court reached the opposite conclusion. We prefer the reasoning in its earlier decision.

The plaintiff thinks that *Crane* v. *Commissioner,* 331 U. S. 1, supports her contention. In that case the Court held that the word "property" as used in the tax statute there involved, meant the physical object, and not the taxpayer's equity of redemption in the object. The Court pointed out that Congress had, in the legislation there under consideration, used the words "property" and "equity" with obvious discrimination. Besides, there were cogent reasons why Congress would have intended the word "property" as there used to be taken literally. In the instant case we have no problem of a distinction between property and an equity in property. And if the argument based on the *Crane* case were accepted, there would be no possible reason for stopping where the plaintiff would have us stop, with the estate tax. The argument would apply equally to the case where the heir paid the debts of the prior estate out of his own funds, and kept the inherited "property" intact. All the authorities reject this conclusion.

The plaintiff's motion for a summary judgment is denied. The defendant's motion for a summary judgment is granted and the plaintiff's petition is dismissed.

It is so ordered.

Whitaker, Judge, and Jones, Chief Judge, concur.

Littleton, Judge, dissents.

[fol. 15] Clerk's Certificate to foregoing transcript omitted in printing.

Court of Claims 31

FILED
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HAROLD B. WILLEY, Cle

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 571

EDITH BLOEDORN, Executrix of the Estate of Rose L. Sutherland, Deceased,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Edgar J. Goodrich,
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Counsel for Petitioner.

Guggenheimer, Untermyer,
Goodrich & Amran,
George S. Elmore,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 571

EDITH BLOEDORN, EXECUTRIX OF THE ESTATE OF ROSE L. SUTHERLAND, DECEASED,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edith Bloedorn, Executrix of the Estate of Rose L. Sutherland, Deceased, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Claims, entered in the above entitled case on November 3, 1953.

Opinion Below

The opinion of the Court of Claims is as yet unreported. It appears at page 6 of the record.

Jurisdiction

The judgment of the Court of Claims was entered on November 3, 1953 (R. 10). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1251.

Question Presented

Is the deduction in decedent's estate for property previously taxed in the estate of prior decedent (where all requirements of Section 812(c) of the Internal Revenue Code are admittedly satisfied) the value of the property actually received by decedent from the estate of prior decedent, or must such value be reduced by the amount of federal estate taxes thereon, not paid from the assets of the estate of the prior decedent, but paid by decedent from her own funds on behalf of the estate of prior decedent?

Statute Involved

The pertinent statutory provisions are printed in Appendix A, *infra*, p. 12.

Statement of the Case

The Honorable George Sutherland died July 18, 1942. His sole legatee and executrix was his widow, Rose L. Sutherland, who died April 4, 1946. Her principal beneficiary and executrix is Edith Bloedorn, petitioner herein.

Rose filed a federal estate tax return as executrix of George's estate, disclosing a tax liability of $124,213.88. Of that amount Rose paid $121,679.97 out of her own funds, and not from the assets of George's estate. Rose actually received property from George's estate valued in his estate at $492,518.44.

After Rose's death, petitioner filed a federal estate tax return for Rose's estate. Deduction for property previously taxed under Section 812(c) of the Internal Revenue

Code was claimed in the amount of $492,518.44. Defendant reduced this amount by the amount of tax paid by Rose on behalf of George's estate from her own funds.[1]

The tax on this amount so disallowed as part of the deduction for property previously taxed is $34,116.82. Respondent denied petitioner's timely refund claim for that amount. Petitioner filed suit in the Court of Claims. That Court, consisting of only four judges due to an unfilled vacancy, denied petitioner's, but granted respondent's, motion for summary judgment. Judge Littleton dissented.

Specification of Errors to Be Urged

The Court of Claims erred:

1. In holding that in computing the deduction for property previously taxed, the value of identifiable property inherited from the prior decedent and admittedly still owned by decedent at her death was to be reduced by the amount of federal estate taxes on the prior decedent's estate, which had been paid by the decedent out of her own funds.

2. In not holding that since the decedent's estate included identifiable property admittedly inherited from prior decedent who died within the previous five years, the deduction for property previously taxed in decedent's estate is equal to the value of that identifiable property as included in, and taxed as part of, the prior decedent's estate.

3. In not following the decision of the Fifth Circuit Court of Appeals in *Thomas* v. *Earnest*, 161 F. (2d) 845 (5th Cir. 1947).

4. In not following this Court's definition of "property" announced in *Crane* v. *Commissioner*, 331 U. S. 1 (1947).

5. In denying petitioner's motion for summary judgment

[1] Identifying the parties by statutory terms:—George Sutherland is "prior decedent"; Rose L. Sutherland is "decedent"; $492.518.44 is the value of "property previously taxed".

and in granting respondent's motion for summary judgment.

Reasons for Granting the Writ

1. The decision of the Court of Claims is directly in conflict with the decision of the Fifth Circuit Court of Appeals in *Thomas* v. *Earnest, supra,* which in turn conflicts directly with the decision of the Second Circuit Court of Appeals in *Central Hanover Bank and Trust Co.* v. *Commissioner,* 159 F. (2d) 167 (2d Cir. 1947).

The Court of Claims here relied upon the decision in the *Central Hanover* case as "denying the same contention made herein by the plaintiff". It then went on to say: (R. 9).

> "The Court of Appeals for the Fifth Circuit decided the question the same way in *Bahr* v. *Commissioner,* 119 F. 2d 371. In the later case of *Thomas* v. *Earnest* . . . that Court reached the opposite conclusion. We prefer the reasoning in its earlier decision".

In the *Central Hanover Bank* case, the Court admitted that a further conflict existed "in principle" (159 F. (2d) at p. 169) between it and the decision of the First Circuit Court of Appeals in *Commissioner* v. *Garland,* 136 F. (2d) 82 (1st Cir. 1943).

2. The decision of the Court of Claims is urged to be erroneous and the conflicting decisions in *Thomas* v. *Earnest, supra,* and *Commissioner* v. *Garland, supra,* correct. Moreover the decision below seems to conflict with the decision of this Court in *Crane* v. *Commissioner, supra,* inasmuch as it fails to abide by the definition of the term "property" given therein by this Court.

a. Section 812(c) was written into the statute for the express purpose of exempting from estate tax, property which had been subject to that tax within the preceding five

years. This it accomplishes by allowing the value of such property as a deduction from the gross estate of the second decedent. To identify and qualify property for this deduction specific requirements of the statute must be met. Reduced to non-technical language those requirements essential to this case are:

(1) The property must have been included in the gross estate of a person who died within five years prior to the death of decedent.

(2) The property must be identified as having been received by decedent from the prior decedent by bequest, devise or inheritance.

(3) The property must have been subjected to estate tax as a part of the estate of the prior decedent.

(4) The tax determined due upon the estate of the prior decedent must have been "paid by *or on behalf of* such estate . . ." (emphasis supplied).

Admittedly, every one of those requirements is met and satisfied in this case.

But the Court of Claims, going beyond the express requirements of the statute, has set up an additional one of its own. It disregards the statutory permission to let the tax be paid, not out of the assets of the estate of the prior decedent, but by someone else "*on behalf* of such estate" (emphasis supplied) and holds that the value of property previously taxed (even though that value is stipulated as in this case) must be reduced by the amount of federal estate taxes attributable to that property in the prior decedent's estate, *no matter who paid that tax.* In other words, the Court of Claims holds—contrary to the facts—that the tax must be deemed to have been paid from assets of the estate of the prior decedent and that therefore the decedent received from that estate, and owned at the time of her death, not the full stipulated value of the previously taxed prop-

erty actually received and held by her, but that value reduced by the amount of that tax.

In short, the Court of Claims says, in effect: "Whatever the facts may be we shall assume that the tax upon the estate of the prior decedent was paid from the assets of that estate and therefore the value of the property passed on to the decedent can never be its full value at the time of the prior decedent's death but must be reduced by that tax. Moreover, we do not think the Congress meant what it said when it wrote into the statute a provision permitting the estate tax to be paid, not out of the assets of the estate, but by another 'on behalf of such estate'."

The Court of Claims questions the intent of Congress and seeks to justify its own judicial legislation in these words *inter alia:* "We think it would be unfair to the legislature to attribute to it an intention which could only be described as erratic . . . an intention to discriminate irrationally between taxpayers. It would be an inexcusable sticking in the letter of a statutory text" (R. 8).

We respectfully submit that the refusal of the Court of Claims to give effect to a clear and unequivocal statutory provision and to substitute its own ideas of what the Congress *intended* to enact is erroneous and indefensible. Two other courts have previously been so tempted with respect to the issue in the instant case but were not misled.

In *Commissioner* v. *Garland* and *Thomas* v. *Earnest, supra,* the First and Fifth Circuits refused to "go beyond the permissible limits of statutory interpretation" (136 F. (2d) at p. 83) and applied the statute as Congress wrote it. Both Courts emphasized that to legislate judicially as they were urged to do by the respondent there—and here—would stultify the clear congressional purpose of Section 812(c) "to avoid a double estate tax within five years on the same specific items of property identifiable as having been re-

ceived by the decedent by bequest, devise or inheritance from the estate of an earlier decedent" (136 F. (2d) at p. 83). The Fifth Circuit pointed out (161 F. (2d) at p. 848) that respondent's proposed rewriting of the statute would instead produce double taxation.

> "Since a deduction of the federal estate taxes would reduce the value of the property upon which a federal estate tax had been calculated and paid, the imposition of a double estate tax on part of the property would result."

b. The decision below refuses to give effect to the statutory phrase "by or on behalf of" with reference to the payment of the estate taxes on the prior decedent's estate. Instead the Court of Claims disposes of that unambiguous statutory provision by a far-fetched observation that it was intended to avoid any "prejudicial consequence, with regard to the application of the statute", i.e. Section 812(c), if the estate tax is paid by another on behalf of the estate. How can the application of the section be adversely affected by the means of payment or the identity of the payor? The quoted phrase needs no interpretation: it is perfectly clear. And it was designed to have a clear meaning; namely, that a decedent was given the privilege of securing freedom from double taxation to the fullest extent by permitting him to pay the estate tax "on behalf of" the estate of his prior decedent.

c. The decision below interprets the word "property" as used in the statute as though it read "equity in property" or "property remaining after certain payments". This further piece of judicial legislation conflicts with this Court's interpretation of the same word in *Crane* v. *Commissioner, supra.* A different section of the Internal Revenue Code—113(a)(5)—was there involved but the principle was the same. This Court insisted that the "words of stat-

utes—including revenue acts—should be interpreted where possible in their ordinary, everyday sense" and went on to say (331 U. S. at p. 7):

> "Strong countervailing considerations would be required to support a contention that Congress, in using the word 'property,' meant 'equity,' or that we should impute to it the intent to convey that meaning."

The applicability in this situation of this Court's decision in the *Crane* case was urged by Judge Hutcheson in his dissent [2] in *Thomas* v. *Earnest* 161 F. (2d) at p. 849:

> "The fallacy . . . was exposed in the Crane case, the fallacy of treating the statute as though it dealt with the taxpayer's equity in the property rather than the property itself."

3. Clearly the question presented is of vital importance in the administration of the federal tax laws and generally as a matter of statutory interpretation.

a. The decision below could cause serious and widespread disturbances in the administration of the federal estate tax. This decision means that whenever inherited property *could* be called upon to contribute to the payment of federal estate taxes, the amount of the deduction for property previously taxed could not exceed the appropriate value of that property reduced by that amount of taxes, even though in fact the property was never called upon to make any payment and even though, in fact, its full value was received by the

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[2] The dissent was only a partial one. Judge Hutcheson agreed with the majority's refusal to reduce the deduction for property previously taxed by the amount of federal estate tax on the prior decedent's estate which the decedent had paid with his own funds. But he wanted to take the further step that neither should be deductible personal debts of the prior decedent, which the decedent had paid with his own funds, be used to reduce the gross value of property previously taxed.

second decedent and was still owned by him at the time of his death. There are innumerable situations which would be affected by that theory.

One instance is a specific legacy under a will in which the testator provided that all taxes be paid out of his residuary estate. That legacy, like every other asset in the estate, is subject to a lien for taxes in event the residue is insufficient. But if it is sufficient and the executor pays the tax out of the residue, nevertheless, under this theory the Commissioner of Internal Revenue could deny to the estate of that legatee a deduction for property previously taxed to the extent of the actual value of the legacy he received. The Commissioner, applying this decision, could limit that deduction, not to what the legatee *did* receive, but to what he *might* have received *if* his legacy had been called upon for contribution to the tax. And in the case at bar, merely because of the possibility that the property in George Sutherland's estate *might have been* reduced by payment of taxes out of it, the Court of Claims ordered a substantial reduction in the amount of the deduction for property previously taxed.

Another illustration is the case of a closely held family corporation. A father, a widower, dies leaving his entire estate (consisting of stock in a family corporation) to his only son. The latter, to avoid selling any shares of stock and losing control of the corporation, pays the estate tax on his father's shares from his own private funds or borrows the money, repaying the loan from earnings, and so takes over and preserves all the shares intact from his father's estate. The son then dies within five years. The Court of Claims would deprive the son's estate of the full deduction of the value of the inherited shares. Surely, that is contrary to the plain provisions of the statute.

Numerous other examples could be given of situations in which this theory, if applied, would distort the plain intendment of the statute and disrupt the established and proper administration of the estate tax laws.

b. Already there have been seven other decisions[3] involving various problems in this immediate area, and the several courts have adopted several conflicting positions.

It is respectfully urged that the importance of this issue calls for the exercise by this Court of its power to eliminate the existing uncertainties.

c. Unless this Court's definition of the word "property" is adhered to and applied in Section 812(c), as well as in numerous other sections of the Internal Revenue Code where that word appears, conflict and lack of uniformity of decision will result. That has already materialized in this case by the refusal of the Court of Claims to accept that definition as laid down by this Court in *Crane* v. *Commissioner*.

d. The Court of Claims concluded that Congress, if it meant what it said, "must have been willing to permit a substantial loss of revenue, in cases such as the instant one". The Court itself thus points up the importance of the question here involved. Settlement of the question by this Court therefore is plainly in the public interest.

e. It is in the public interest that this Court insist upon the strict application of the taxing statutes as enacted by the Congress and discourage the lower courts from ignoring, or distorting, those statutes to meet their own views—in other words, from resorting to judicial legislation.

The Court of Claims has done that in this case. It does not deny that petitioner's case fell fully within the unambiguous language of the applicable statute. But it undertook to rewrite that statute to accord with what the Court thought was the Congressional purpose behind it. Neither respondent on brief, nor the Court in its decision, cites any reference to legislative his-

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[3] *Thomas* v. *Earnest, Commissioner* v. *Garland, Central Hanover Bank and Trust Co.* v. *Commissioner*, all supra; *Bahr* v. *Commissioner*, 119 F.(2d) 371 (5th Cir. 1941); *McCarthy* v. *Delaney*, 76 F. Supp. 471 (D. Mass. 1948); *Estate of George Rice*, 7 T.C. 223 (1946), acq. 1946-2 Int. Rev. Cum. Bull. 4; *C. C. Churchill*, 3 T.C.M. 265 (1944).

tory or any other congressional source in anywise supporting its conclusion as to the legislative purpose. The Second Circuit Court of Appeals in its opinion in the *Central Hanover Bank* case, upon which the decision below relies, is even more frank in admitting that it was rewriting Section 812(c) to suit its own opinion as to how this particular question *should have been* handled by Congress, admitting that the Congress did *not* write the statute as the Court thought it *should have been* written.

Conclusion

For the foregoing reasons it is respectfully urged this petition for a wit of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Statute Involved

Section 812, Internal Revenue Code, 26 U.S.C. Section 812

Net Estate

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(c) Property Previously Taxed.—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, . . . where such property can be identified as having been received by the decedent . . . from such prior decedent by gift, bequest. devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. . . . This deduction shall be allowed only where . . . an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of . . . the estate of such prior decedent . . . and only in the amount finally determined as the value of such property in determining the value of . . . the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this subsection, section 861(a)(2), or the corresponding provisions of any prior Act of Congress, in respect of the property or property given in exchange therefor.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 571

EDITH BLOEDORN, EXECUTRIX OF THE ESTATE OF ROSE L. SUTHERLAND, DECEASED, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM SUGGESTING THAT THE PETITION FOR A WRIT OF CERTIORARI IS OUT OF TIME

The judgment of the United States Court of Claims in the above entitled case was entered on November 3, 1953. The ninety-day period within which a petition for a writ of certiorari could be filed expired on February 1, 1954, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court. The petition was filed on February 3, 1954, more than ninety days after the date of judgment.

It appears, therefore, that petitioner's applica-

tion for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

APRIL, 1954.

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